

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

NATHAN WENBERG,

Plaintiff,

v.

DEVEAR, et. al.,

Defendants.

No. C 13-1951 NJV (PR)

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND**

Plaintiff, an inmate at Salinas Valley State Prison, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations

omitted). Although in order to state a claim a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. The United States Supreme Court has recently explained the “plausible on its face” standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

B. Legal Claims

Plaintiff alleges that he was sleeping in his cell when defendant Devear, a correctional officer, came to the cell, opened up the food tray slot and discharged a stream of pepper spray into the cell and plaintiff’s face and eyes. Defendant closed the slot and left. Plaintiff states he was forced to stay in his cell for fifteen hours without receiving decontamination or medical attention. Plaintiff also states he slipped and fell on the residual pepper spray on the ground and injured his leg and hip and continues to suffer from pain and diminished function.

Plaintiff also alleges that later several nurses were deliberately indifferent to his serious medical needs in the treatment of his injuries. Other than this conclusory statement, plaintiff provides no other allegations or information regarding the nurses’

1 actions or what medical care was denied. Liberally construed, plaintiff's allegations against
2 Devear are sufficient to proceed as a violation of the Eighth Amendment. However, the
3 allegations regarding the inadequate medical care are dismissed with leave to amend for
4 plaintiff to identify how the specific defendants were deliberately indifferent to his serious
5 medical needs. Simply stating that defendants denied him treatment is insufficient. Failure
6 to file an amended complaint with additional allegations against the medical care
7 defendants will result in the dismissal of all defendants, except Devear, and the case will
8 continue solely against him.

9 Deliberate indifference to serious medical needs violates the Eighth Amendment's
10 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104
11 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*
12 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).
13 A determination of "deliberate indifference" involves an examination of two elements: the
14 seriousness of the prisoner's medical need and the nature of the defendant's response to
15 that need. *Id.* at 1059.

16 A "serious" medical need exists if the failure to treat a prisoner's condition could
17 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.* The
18 existence of an injury that a reasonable doctor or patient would find important and worthy of
19 comment or treatment; the presence of a medical condition that significantly affects an
20 individual's daily activities; or the existence of chronic and substantial pain are examples of
21 indications that a prisoner has a "serious" need for medical treatment. *Id.* at 1059-60.

22 A prison official is deliberately indifferent if he or she knows that a prisoner faces a
23 substantial risk of serious harm and disregards that risk by failing to take reasonable steps
24 to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only
25 "be aware of facts from which the inference could be drawn that a substantial risk of serious
26 harm exists," but he "must also draw the inference." *Id.* If a prison official should have
27 been aware of the risk, but was not, then the official has not violated the Eighth
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1 Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175,
2 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and prison
3 medical authorities regarding treatment does not give rise to a § 1983 claim." *Franklin v.*
4 *Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

5 CONCLUSION

6 1. The claims against the medical care defendants are **DISMISSED** with leave to
7 amend to file an amended complaint in accordance with the standards set forth above. The
8 amended complaint must be filed within **twenty-eight (28) days** of the date this order is
9 filed and must include the caption and civil case number used in this order and the words
10 AMENDED COMPLAINT on the first page. Because an amended complaint completely
11 replaces the original complaint, plaintiff must include in it all the claims he wishes to
12 present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not
13 incorporate material from the original complaint by reference. Failure to amend within the
14 designated time will result in the dismissal of all defendants except Devear and the Eighth
15 Amendment claim and the case will continue on the original complaint against Devear.

16 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
17 court informed of any change of address by filing a separate paper with the clerk headed
18 "Notice of Change of Address," and must comply with the court's orders in a timely fashion.
19 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
20 Federal Rule of Civil Procedure 41(b).

21 **IT IS SO ORDERED.**

22 Dated: July 9, 2013.


23 NANDOR J. VADAS
United States Magistrate Judge

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